

<sup>2</sup> The Board notes that, following the August 24, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

### **FACTUAL HISTORY**

On May 10, 2021 appellant, then a 51-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on May 10, 2021 she sustained a lower back injury when holding onto a safety belt to assist a patient while in the performance of duty. She did not stop work.

In a development letter dated May 24, 2021, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary. OWCP afforded appellant 30 days to respond.

In May 10 and 17, 2021 work capacity evaluations (Form OWCP-5c), Dr. Bin Yang, a Board-certified occupational medicine specialist, diagnosed tenderness of the right and left paraspinal and lateral lower back. He provided work restrictions of no lifting, carrying, or pulling over 15 pounds, and alternatively sitting and standing through May 17, 2021.

By decision dated June 23, 2021, OWCP denied appellant's traumatic injury claim, finding that she had not established a low back condition causally related to the accepted May 10, 2021 employment incident. Consequently, it found that she had not met the requirements to establish an injury as defined by FECA.

On July 3, 2021 appellant requested reconsideration of OWCP's June 23, 2021 decision and submitted additional evidence.

A temporary limited-duty assignment note dated May 10, 2021 from Michelle Dunn, a registered nurse, suggested that appellant's modified duties be extended through May 25, 2021.

In a May 26, 2021 Form OWCP-5c, Dr. Yang reiterated appellant's diagnosis and indicated that she should continue work restrictions through June 7, 2021.

OWCP also received duplicate copies of Dr. Yang's May 10, 17, and 26, 2021 reports and a Form CA-1 dated May 10, 2021.

By decision dated August 24, 2021, OWCP denied appellant's reconsideration pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United

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<sup>3</sup> *Supra* note 1; *D.M.*, Docket No. 18-1003 (issued July 16, 2020); *L.C.*, Docket No. 19-0503 (issued February 7, 2020); *A.A.*, Docket No. 18-0031 (issued April 5, 2018); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

States within the meaning of FECA,<sup>4</sup> that the claim was timely filed within the applicable time limitation of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>5</sup> These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>6</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged.<sup>7</sup> Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.<sup>8</sup>

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and specific employment factors identified by the employee.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met her burden of proof to establish a low back condition causally related to the accepted May 10, 2021 employment incident.

In OWCP-5c forms dated May 10 and 17, 2021, Dr. Yang diagnosed tenderness and a spasm of the right and left paraspinal and lateral lower back and provided work restrictions. However, he did not provide an opinion as to the cause of her condition. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is

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<sup>4</sup> *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued December 13, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>5</sup> *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>6</sup> *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>7</sup> *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>8</sup> *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>9</sup> *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

of no probative value on the issue of causal relationship.<sup>10</sup> These reports are, therefore, insufficient to establish appellant's burden of proof.

As there is no rationalized medical evidence explaining how appellant's employment duties caused or aggravated her diagnosed condition, the Board finds that appellant has not met her burden of proof to establish a low back condition causally related to the accepted May 10, 2021 employment incident.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.<sup>11</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>12</sup>

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>13</sup> A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>14</sup> If the request is timely but fails to

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<sup>10</sup> See *B.S.*, Docket No. 20-0895 (issued June 15, 2021); see *D.C.*, Docket No. 19-1093 (issued June 25, 2020); see *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>11</sup> 5 U.S.C. § 8128(a); see *D.G.*, Docket No. 20-1203 (issued April 28, 2021); *T.K.*, Docket No. 19-1700 (issued April 30, 2020); see *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

<sup>12</sup> 20 C.F.R. § 10.606(b)(3); see *D.G.*, *id.*; *L.D.*, *id.*; see also *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>13</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). Chapter 2.1602.4b.

<sup>14</sup> *Id.* at § 10.608(a); *D.G.*, *supra* note 11; *F.V.*, Docket No. 18-0230 (issued May 8, 2020); see also *M.S.*, 59 ECAB 231 (2007)

meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Appellant's timely July 3, 2021 request for reconsideration did not demonstrate that OWCP erroneously applied or interpreted a specific point of law. Moreover, she has not advanced a relevant legal argument not previously considered. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>16</sup>

Furthermore, appellant has not provided relevant and pertinent new evidence in support of her request for reconsideration. On reconsideration she submitted a temporary limited-duty assignment note dated May 10, 2021 from Ms. Dunn and a May 26, 2021 Form OWCP-5c from Dr. Yang, reiterating her diagnoses and work restrictions. However, the underlying issue on reconsideration was whether appellant had met her burden of proof to establish that her medical condition was causally related to the accepted May 10, 2021 employment incident. This is a medical issue that requires rationalized medical opinion evidence to resolve the issue.<sup>17</sup> These reports, however, do not provide a rationalized medical opinion on whether appellant's diagnosed condition was causally related to the employment incident and, therefore, are insufficient to warrant a merit review.

In addition, appellant resubmitted copies of Dr. Yang's May 10, 17, and 26, 2021 reports and a duplicate Form CA-1 dated May 10, 2021. The Board, however, has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case and thus, these reports are also insufficient to warrant a merit review.<sup>18</sup> OWCP also received a May 10, 2021 temporary limited-duty assignment note from Ms. Dunn, a registered nurse. The Board has long held that certain healthcare providers such as physician assistants, nurse practitioners, and physical therapists are not considered qualified physicians as defined under FECA. Their medical findings, reports and/or opinions, unless cosigned by a qualified physician, will not suffice for purposes of establishing entitlement to FECA benefits. Consequently, this additional evidence is irrelevant to the underlying issue of causal relationship, which is medical in nature. As appellant did not provide

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<sup>15</sup> *Id.* at § 10.608(b); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>16</sup> *See R.L.*, Docket No. 20-1403 (issued July 21, 2021); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

<sup>17</sup> *F.L.*, Docket No. 20-1288 (issued July 13, 2021); *D.P.*, Docket No. 20-1225 (issued January 8, 2021); *R.S.*, Docket No. 19-0312 (issued June 18, 2019); *T.B.*, Docket No. 18-1214 (issued January 29, 2019).

<sup>18</sup> *Id.*; *D.M.*, Docket No. 18-1003 (issued July 16, 2020); *L.C.*, Docket No. 19-0503 (issued February 7, 2020); *A.A.*, Docket No. 18-0031 (issued April 5, 2018); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

relevant and pertinent new evidence related to the underlying issue of causal relationship, she is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608(b), OWCP properly declined to review the merits of the claim.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish a low back condition causally related to the accepted May 10, 2021 employment incident. The Board further finds that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 23 and August 24, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 6, 2022  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board